SUPREME COURT, U. S.
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No. 925 -

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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DAVE EVANS,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Petitioner, Dave Evans, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

## JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated January 9, 1968, affirmed the judgment of conviction. The opinion of the Court of Appeals is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered January 9, 1968, and is reprinted as Appendix B, *infra*. A Petition for Rehearing En Banc was timely filed but was denied by order dated April 17, 1968, which order is reprinted as Appendix C, *infra*.

On March 24, 1969 this Court entered an order granting Certiorari in this case, vacating the judgment of the United States Court of Appeals and remanded the case to the United States District Court for further proceedings and conformation with the opinion of this court in *Alderman v. United States*, 384 U.S. 165. On July 16, 1969 the District Court held that the evidence supporting the conviction was not tainted by illegal electronic eavesdropping and entered a new final judgment. The opinion of the United States Court of Appeals for the Seventh Circuit in the above entitled case dated October 2, 1970 affirmed this new judgment of conviction. The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix D *infra*. The judgment order of the Court of Appeals was entered on October 2, 1970 and is reprinted as Appendix E, *infra*.

## JURISDICTION

The Judgment of the Court was entered on October 2, 1970, Appendix D, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether under *Krulewitch* v. *United States*, 336 U.S. 440 (1949) and *Ingram* v. *United States*, 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. §1951, can be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.

2. Are the principles of *Michelson* v. *United States*, 335 U.S. 469 (1948) violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business?

3. Was the petitioner deprived of his right of cross-examination, guaranteed by the Sixth Amendment to the Constitution, when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses, and from inquiring into their motives in testifying?

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1951, reads in part:

"§ 1951. *Interference with commerce by threats of violence.* (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

(b) As used in this section —

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

## STATEMENT OF THE CASE

The substance of the indictment was that petitioner, Dave Evans, together with two others, Joseph Amabile and Salvatore Battaglia,[1] were indicted for conspiracy to violate the Hobbs Act, Title 18, U.S. Code, Section 1951. The one-count conspiracy indictment charged that the three defendants, together with alleged co-conspirators, non-defendant Rocco Pranno, conspired "to obstruct, delay and affect commerce" in the construction of multiple dwelling units in Lansing, Illinois, and to obstruct "the movement in interstate commerce of materials, supplies and other commodities required for the construction, sale, rental and management of the units, and to attempt to do so by extortion."

The indictment alleged that the conspiracy began "in or about July, 1964" and continued to the time of the filing of the indictment, February 16, 1967. It charged that as part of the conspiracy the defendants and co-conspirator "would attempt to obtain and did obtain property to the value of $48,500 in the form of money, from the Riley Management Corporation . . . induced by the wrongful use of fear in that the defendants and co-conspirator by threatening language did put and attempt to put William Riley in fear of bodily harm and in fear of his personal safety and security and did threaten economic harm to the Riley Management Corporation and to William Riley" unless and until Riley would cause the payment of the money to the defendants and co-conspirator by the Riley Management Corporation (A. 19-21).

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[1] Separate Petitions will be filed by these defendants.

## STATEMENT OF THE FACTS

### (a) Evidence of The Three Government Witnesses Relating to the Alleged Conspiracy.

William Riley was President of the Riley Management Corporation. (A. 489). His company was building the King Arthur project, a group of apartment buildings, in Lansing, Illinois. Petitioner Dave Evans was his superintendent of construction on that job (A. 501).

In June, 1964, Riley had a conversation with Evans in which he told Evans that the Lansing job was to begin and that Evans was to let the sewer contract. Riley told Evans that he did not want the people from Melrose Park, especially Amabile and Palermo, to know of this Lansing project (A. 502-3). A few days later, Palermo contacted Riley about the work on the Lansing project (A. 503).

In late July or early August, 1964, Amabile, DiVito and Pranno met. DiVito had been in the sewer contracting business for a number of years. Amabile told DiVito and Pranno that they could get the sewer and water mains contract of the Lansing project if they could come up with a "good clean fellow" to head the job (A. 124).

In mid-September, Pranno and DiVito spoke with LaKey and convinced him to take charge of the company that would have the sewer contract for the Lansing project (A. 126-7)

Later during the month of September, Pranno, DiVito and Evans met at Amabile's apartment and Pranno informed Amabile that they had a "good clean fellow", LaKey. Amabile then said he would give them the job but that he wanted $20,000 "off the top" from them. Pranno agreed to give Amabile the money (A. 128-9, 256).

Government witnesses Mike DiVito, Henry LaKey and an unindicted alleged co-conspirator, Rocco Pranno, formed the Carlson Construction Company in October, 1964, for the purpose of bidding on and getting the sewer construction job (A. 130-132).

Pranno loaned Carlson Construction Company approximately $13,000 for its initial bank deposit in order to start business (A. 273). Some $12,000 of that initial money was deposited by LaKey to the account of Carlson Construction Company in October, 1964 (A. 273). Pranno, DiVito and LaKey borrowed an additional $5,000 in cash for the Carlson Construction Company account (A. 146).

The Carlson Construction Company commenced operations. It put in the pipes, water lines and water pumping lifts (A. 287-8).

Because of urgencies, shipments were made to the project in Lansing, Illinois, quite rapidly from the Granco Steel Company, St. Louis, Missouri, "These shipments had been expedited rather than delayed." They were sent earlier to Lansing from Missouri than was normally done (A. 108).

DiVito and Pranno informed Amabile that they would need more money on the job if Amabile was to get his $20,000. Amabile instructed Evans to "jack up" the price of the contract. Evans did so by preparing another bid some $40,000 to $45,000 higher (A. 310). There was no need to "jack up" the prices of the construction if extortion was to be the means to obtain money.

In November, 1964, Amabile instructed LaKey to make the first draw from the Riley Company. LaKey drew up the papers calling for a draw of $55,000 (A. 537). However, Evans reworked the figures and arrived at the amount of $47,517.97 (A. 302).

On November 12, 1964, LaKey obtained the first draw from the Riley Company for its work in the amount of $47,517.97 (A. 303). LaKey deposited $39,000 in the Carlson bank account, keeping $8,517 (A. 304). He said he gave Pranno $8,000 in cash, retaining $517 himself for two weeks of his salary (A. 305).

At Amabile's request, LaKey withdrew $20,000 in cash and gave it to Amabile on November 15, 1964 (A. 306-7).

LaKey and Amabile visited Evans, who was a patient in a hospital, and Amabile gave Evans a "wad of money" (A. 301).

Numerous conversations took place where Amabile instructed DiVito, LaKey, Pranno and Evans that Riley was not to learn of Pranno and Amabile's connection with the Carlson Construction Company. Amabile also told these men that Riley was not to know that Evans was in any way connected with the Carlson Construction Company (A. 140, 143, 281, 286, 347).

After the first draw had been made, LaKey complained to Evans that he was unable to pay his bills, and Evans allegedly told LaKey not to worry and stated: "I'll talk to Joe Shine and Joe Shine will talk to the man. We will see that the money is in the bank for you." (A. 342). This conversation again emphasized that Evans was intent on receiving money for the Carlson Construction Company so that the work would continue and the bills could be paid.

LaKey made a request for a second draw of $48,500 in early January, 1965 (A. 345). Riley's controller, one Sol Meltzer, refused to authorize a payout. Riley told LaKey that he would not authorize the payout because he learned that the suppliers on the job were not being paid (A. 349).

LaKey then told Amabile in Evans' presence that the second payout draw was turned down by the Riley people (A. 346). Amabile told Evans that he wanted Evans to go with LaKey to the Riley office the following morning (A. 346). The next morning, Evans suggested to LaKey that they should enter the Riley offices separately (A. 347). Evans and LaKey spoke with Riley concerning the second draw and Evans said that complications had developed on the job (A. 350). Riley again turned down LaKey (A. 351).

LaKey again returned to Amabile and informed him that Evans and he had been turned down by Riley (A. 351). At this meeting, Evans was not present. Amabile then told LaKey, "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." (A. 351).

The next day, Amabile and LaKey went to the offices of the Riley Company in Bellwood, Illinois and talked to Riley. Riley told Amabile that they couldn't pay because to do so would jeopardize his position with the lending institution. According to Riley, Amabile told Riley that he had to pay LaKey, that LaKey was a friend of theirs; and that, if he didn't pay, "all sorts of people would get mad" (A. 533). Amabile said that Riley had no choice in the matter, that he had to pay LaKey, that "the man" wanted him paid. Evans was not present at this meeting (A. 534-5).

Subsequently, Riley authorized the payout by Lawn Savings and Loan Association to Carlson Construction Company in the approximate amount of $48,500, the payment alleged in the indictment to have been extorted from him.

Riley testified that he authorized this payment because he was afraid of Amabile. Over objections, he testified he was afraid because, "in previous meetings I had been

threatened repeatedly. I had been at numerous, numerous meetings, where I was threatened with physical harm, harm to my family, collapse of the company, rumination, employees threatened." (A. 536-8).

Over objections, Riley stated that Amabile and Nick Palermo (not referred to in the indictment anywhere) threatened him (A. 538-9).

Riley testified that as late as October, 1965, he thought Evans was a very fine man (A. 730).

From the second draw which LaKey received, he said he withdrew $17,000 for Amabile (from which LaKey got $5,000) (A. 358-361).

LaKey had gone to Florida after the payment of the second draw and was called there by Evans. Evans told him that there had been trouble on the job and that Amabile wanted to see him (A. 361).

LaKey returned from Florida and in the presence of Evans, Amabile told LaKey, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble." (A. 361-2). Since LaKey was present at the time of Amabile's threat, this conversation is an indication that even at this late date Evans was not aware of the threat and that Amabile was deliberately keeping knowledge of the threat from him.

### (b) Evidence of Palermo-Amabile Threats Not Anywhere Alleged in the Indictment.

Riley testified that in April, 1962, he was in the offices of Nick Palermo's Melrose Park Plumbing Company. Palermo asked him about a proposed building project in

Northlake, Illinois, and Amabile told Riley that he, Amabile, was the man in Northlake and that Riley was not going to build in Northlake without his permission. Amabile told Riley it would cost him $70,000 (A. 546). A number of subsequent meetings were held with Palermo and Amabile in 1962 and at one of these Amabile asked Riley if he had the $70,000. Riley said he did not. Palermo said that he had the ability to stop the project of Riley's then being constructed in Addison, Illinois. Riley said he could not pay $70,000. Amabile said to give him $30,000 in cash and $40,000 in checks. Subsequently, Riley paid Amabile $30,000 in cash (A. 548-557).

Riley testified that in September, 1963, Palermo and Amabile talked to him about the plumbing work for a project in Westmont, Illinois. Amabile told Riley he must give the plumbing work to Palermo. Riley objected to the quality of Palermo's work. Amabile told Riley that he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy" (A. 563-4). Riley asked to leave; Amabile told him he could not do so. They said that Riley's construction superintendent, one Hubley, was the cause of all the problems. Palermo said that he would bury Hubley, and Amabile added that he would hammer the nails in Hubley's coffin (A. 564). Then Amabile told Riley that he knew where Riley's mother lived, where his children went to school, and that he would need a candy cane from then on out if they did not get the plumbing contracts (A. 565).

**(c) Evans-Battaglia.**

Evans did not know, nor had he ever met Battaglia during the period of the alleged conspiracy. Evans first met Battaglia in 1967 on the day this case was first called in court (A. 853-4).

**(d) The Defense.**

The petitioner, Evans, testified in his own behalf. Though he was precluded from denying many of the important alleged conversations and occurrences and from introducing affirmative evidence of his innocence, Evans did make a general denial that he was not involved in the crime charged in the indictment (A. 919-920). Evans also testified that he never received any money from Amabile as alleged by the Government witnesses (A. 901).

Evans testified that he was 52 years old and that he had been gainfully employed in the construction business since he had been 18 years old. He had served with the United States Army and had received an honorable discharge. He had never been arrested (A. 850-1).

Evans also attempted to introduce evidence of his good reputation in the business community through four (4) witnesses who had known him for a long period of time. This evidence was declined by the trial judge. (A. 811, 816, 820, 839).

## REASONS FOR GRANTING THE WRIT

**1. Under Krulewich v. United States, 336 U.S. 440 (1949) and Ingram v. United States, 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. §1951, cannot be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.**

### A.

The decision of the court below is based on the theory of guilt by association, specifically warned against by this Court in *Krulewich* v. *United States*, 336 U.S. 440 (1949) (Jackson, J., concurring). Upon evidence of an association with a person who has in the past been "evil," a man is deemed to be accountable for any "evil" act that this associate may perpetrate.

Conceding that the petitioner was not aware of Amabile's extortion, the court below relied upon the evidence that "On this record, it is obvious that Evans knew of Riley's fear of Amabile . . . It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would be employing coercive means for obtaining a second draw." (Appendix A page 9 *infra*). The potential for abuse of this "birds of a feather" doctrine is unlimited. Mere association replaces the fundamental principle of *agreement* in the law of conspiracy. This theory should be considered as one of the "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions," *Grunewald* v. *United States*, 353 U.S. 391 at 404 (1957).

The danger inherent in the association theory is particularly evident in the case against the petitioner; even according to the government evidence, the petitioner was an unwilling and reluctant associate of Amabile. (App. 364). Further, the circumstances of Evans' relationship with Amabile would lead Evans to believe that Amabile intended to use non-violent means to obtain money from the Riley Management Corporation.

Viewing the evidence in the light most favorable to the Government, the petitioner knew that Amabile had arranged for Henry LaKey, a "good, clean fellow," to head the Carlson Construction Company. (App. 128-9). Amabile had also obtained the services of DiVito, a knowledgeable sewer contractor, who could actually perform the contract behind the facade of the Carlson Corporation. Evans knew that the contract prices were raised to insure all the co-conspirators receiving their share in excess of the costs of completing the contract work. Evans knew that Amabile stressed that Riley should never find out that Amabile or Pranno were in any way connected with the Carlson Construction Company. (A. 140, 143, 281, 286, 347). There was to be no direct contact between Amabile and Riley. These circumstances of necessity led Evans to believe that Amabile did not intend to repeat whatever actions had made Riley fear Amabile in the past.

In *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), a conspiracy to violate the Hobbs Act, the court reversed the conviction of the defendant Dragna even though the victim testified that he actually feared Dragna as being connected with the underworld and associated Dragna's appearance with the extortionist, Carbo's, threat. Though Dragna had a discussion with the victim, in which he told the victim "you are dealing with . . . big people and if your

word is no good you are no good in this game," there was no evidence that he knew of or participated in the actual threat. The Court rejected any suggestion that "those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or threat of violence." Certainly if a man like Dragna who was actually feared himself is not to be deemed guilty because of his association with men who in fact commit extortion, the non-violent petitioner should not be convicted because of the knowledge that his associate was feared by the victim in the past.

The court below's misplaced reliance on the precedents of *Pereira* v. *United States*, 347 U.S. 1 (1954) and *Lefco* v. *United States*, 74 F.2d 66 (3rd Cir. 1934), to support its guilt by association theory demonstrates its misunderstanding of the conspiracy concept. This Court's decision in *Pereira* stands only for the evidentiary rule that if there is sufficient evidence of agreement to commit the crime charged, a co-conspirator is responsible for the acts and declarations of another co-conspirator which could have been reasonably foreseen to be necessary to carry out that conspiracy. *Pereira* does not stand for the boot strap method of proving the conspiracy itself by means of assumption and references based on association.

The court below has done exactly what the court in *United States* v. *Peoni*, 100 F.2d 401 (2nd Cir. 1938) warned against. In *Peoni*, the court said:

> "at times it seems to be supposed that once some kind of criminal concert is established, all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. . . . The confusion is

> perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in an execution of the concert to which the accused is privy, though that doctrine too is often abused."

This confusion in the court below has resulted in petitioner's conviction and in an illogical theory of the law of conspiracy.

**B.**

In its opinion, the court below further expanded the theory of guilt by association when it removed the requirement of the limitation of the scope of a conspiracy based on the determination of the common understanding, an aspect of specific intent. In so doing, the Seventh Circuit is in conflict with the Second Circuit, *United States* v. *Crimmins*, 123 F.2d 271 (1941), the Ninth Circuit, *Twitchell* v. *United States*, 313 F.2d 425, (1963), the Sixth Circuit, *United States* v. *Barnes*, 383 F.2d 287 (1967) and, it is submitted, with this Court in *Ingram* v. *United States*, 360 U.S. 672 (1959).

The decision below held that a man who "embarked on a criminal venture of indefinite outline" has to "take his chances as to the methods used by the other co-conspirators." (Appendix A pages 10-11 *Infra*)

The evidence against the petitioner showed he entered into an agreement with Amabile, Pranno, DiVito and LaKey to obtain money from the Riley Management Corporation by fraud and deceit. However, the charges for which he stands convicted were of a conspiracy to extort by means of threats and violence.

The basis of the proven plan or agreement was secrecy and misrepresentations. All conspirators agreed that the

one essential ingredient of success in this scheme was that Amabile's connection with Carlson Construction Company was not to be revealed to Riley and that Amabile was to have no direct contact with Riley. How can a man's criminal responsibility rest on the assumption that he took "his chances" on activity that was in direct conflict with the agreed method of the scheme?

In *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), Judge Hand faced the interlocking problems of scope, the hearsay exception, and intent. He pointed out that although

> each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; [the] . . . acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. *It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.* . . . (Emphasis added.)

This court held in *Stirone* v. *United States*, 361 U.S. 212 (1960) that indictments charging violations of the Hobbs Act must be narrowly construed. The requirement in a Hobbs Act conspiracy of an actual agreement for violence was stressed in *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963). In speaking of the defendant Gibson, the court said at Page 734:

> "As to Appellant, Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jordan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect and it is clear that the evidence is sufficient to connect

him with this underlying conspiracy. (2) *the charged conspiracies to accomplish the underlying purpose by extortion and threatening communications.*

The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies. . . . There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. *The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats.*" (Emphasis added).

The evidence shows no *agreement* between the petitioner and Amabile to obtain money by means of threats or violence and without evidence of such an agreement a Hobbs Act conspiracy charge should not be sustained.

This court in *Ingram v. United States*, 360 U.S. 672 (1959) rejected an attempt to create a federal conspiracy violation where only a state substantive crime existed. This court at page 680 stated:

> Without the knowledge, the intent cannot exist. . . . Further, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference on inference, thus fashioning * * * a dragnet to draw in all substantive crimes.

This Court should again denounce the unbridled expansion of federal conspiracy jurisdiction.

**2. The principles of Michelson v. United States, 335 U.S. 469 (1948) are violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business.**

Evidence of a defendant's character and reputation is one of the most vital strongholds in his defense. This Court has long recognized the importance of character evidence and in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948) said, "This principle [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone . . . may be enough to raise a reasonable doubt of guilt . . ."

A declination by the trial court of a defendant's offer to prove his general reputation for honesty and integrity and truth and veracity, is reversible error. *Carnley* v. *United States*, 274 F.2d 69 (5th Cir. 1960)

The four character witnesses who testified in this case had known petitioner from five to twelve years. They had worked with him and were constantly in contact with him and other men in the community who had known and worked with him. The witnesses testified that they had discussed Evans with these other men. The witnesses were then asked if they knew Evans' general reputation in the community for honesty and integrity, truth and veracity and as a law abiding citizen. However, on approximately 24 occasions the trial court sustained the Government's objections to these questions (A. 811-16, 816-20, 820-27, 839-47).

The decision of the court below stated ". . . As to some of the questions, this may have been an overstrict application of *Michelson*. However, *no foundation was laid to show that these witnesses knew any of the people who lived*

*in the community where Evans resided.* Proof of reputation 'among a limited group such as fellow employees in a particular building' has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States*, 168 U.S. 382, 397; *Kroot* v. *United States*, 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to 'disturb rulings of trial courts' in this troublesome field except in rare instances (335 U.S. at p. 480)." (Emphasis added) (Appendix A, Page 21 22 *Infra*)

This limitation of character evidence to the geographical area in which a man lives is unrealistic in view of the complex and everchanging society of today. This Court should recognize that a man's reputation at the place of his day in, day out business is likely to be even more probative of his true character. In this regard Professor McCormick's statement is relevant:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 158 at 335 (1954)

See also *Whiting* v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961) and Am. Jur. Proof of Facts Annotated Character and Reputation Notes, Page 185.

In *United States* v. *White*, 225 F.Supp. 514 (1963) the court said at page 522,

> "The community in which a man lives is not necessarily a geographical unit, but is rather composed of those relationships with others which arises where a

> man works, worships, shops, relaxes, and lives. Evidence tending to show a defendant's reputation in such places is no more difficult to establish than his reputation in his particular city block, which may or may not be important in establishing the defendant's reputation."

Evidence of reputation in the business community was particularly crucial to the petitioner since his criminal activity was allegedly against his employer. The petitioner was portrayed as a disloyal employee of Riley. When a defendant's reputation involves a trait which affects the very charge against him, a trial court exclusion of such evidence is error. *Robinson* v. *United States*, 156 F.2d 574 (D.C. Cir. 1946).

This case affords an opportunity for this Court to enunciate the principle that a defendant is entitled to introduce evidence of his reputation of good character in the business community in which he works.

**3. The petitioner was deprived of his right of cross-examination guaranteed by the Sixth Amendment to the Constitution when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses and from inquiring into their motives in testifying.**

This court recently stated in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

The three most important witnesses for the Government were DiVito, LaKey and Riley. The defense contended that the credibility of each of these individuals was subject to serious question. The testimony of these witnesses concerning conversations and oral statements made in various meetings were largely uncorroborated. DiVito and LaKey were accomplices, and Riley had definite reasons for hostility towards the petitioner.

Counsel for the defendant Amabile moved for the production of the grand jury testimony of the witness DiVito. The District Court asked counsel to provide him with authorities for its production (A. 195). Counsel for Battaglia called the trial court's attention to this Court's ruling in *Dennis* v. *United States*, 384 U.S. 855 (A. 233). However, the trial court informed all counsel that this motion was denied (A. 390). A similar motion for production of Riley's grand jury testimony was denied in the same manner (A. 689).

The opinion of the court below holds that "no particularized need for this testimony was shown, nor was there any showing that the ends of justice required production." (App. A, p. 19 *infra*).

It is submitted that this request for grand jury testimony came within the scope of *Dennis* v. *United States* and is in conflict with the decisions of Courts of Appeals in at least four other circuits. See: *United States* v. *Youngblood*, 379 F.2d 365 (2nd Cir. 1967); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir, 1967); *Cargill* v. *United States*, 381 F.2d 849 (10th Cir. 1967); *Worthy* v. *United States*, 383 F.2d 524 (D.C. Cir. 1967).

Counsel for the defendant Battaglia made inquiry into the residence of the witness Riley. When Government counsel objected and asked to be heard out of the presence

of the jury, the trial court sustained the objection without a hearing (A. 723). The ruling is contrary to the decision of this Court in *Smith* v. *Illinois*, 390 U.S. 129.

In its original decision the Court below distinguished *Smith* v. *Illinois* by stating "In this case the defense was permitted to show that both DiVito and *Riley* were in government custody." (App. A, p. 20 *infra*). However, when in oral argument on the second appeal it was pointed out that the record revealed that the jury was never informed that Riley was in government custody the Court of Appeals gave a new ground to distinguish *Smith* v. *Illinois*. The Court below held "In addition, the defendants had already been permitted to establish that Riley had reason to cooperate with the government, *so that it became unnecessary to show that he was in protective custody.*" (App. D, p. App. 51). The petitioner here under *Smith* v. *Illinois* should have been able to establish that the witness Riley was in protective custody. The fact that Riley was in protective custody also demonstrates the ludicrous nature of the Court below statement that, "However, the record shows that Riley was fearful of physical harm to himself and to his family, so that the trial court properly refused to allow disclosure of his last address." (App. D, p. App. 51). The safety of a witness who is in protective custody of the government can not be jeopardized by disclosure that he is in protective custody. Denial of the trial court to permit the defendants to make inquiry into the residence of the witness Riley constituted error that requires a *per curiam* reversed in this case.

Counsel for the defendants attempted to bring before the jury the facts that Riley was under indictment for theft in the State Court and that he was under investigation by the Internal Revenue Service for tax evasion and

that his testimony was given in hope of securing favorable treatment from local and federal law enforcement officers concerning his illegal conduct (A. 615, 617-8). Professor McCormick has commented:

> The law recognizes the slanting effect upon human testimony of the . . . self-interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . . [one such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him . . . C. McCormick HANDBOOK OF THE LAW OF EVIDENCE, §40, at 82, 83, 84 (1954)

See *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965); *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino*:

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined. . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind of situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is obvious that the atmosphere in the courtroom was such that petitioner and the other defendants were denied effective use of their right to cross-examination guaranteed by the Sixth Amendment to the Constitution.

## ADOPTION

The petitioner specifically adopts the reasons for granting the writ and the arguments of the petitioners, Amabile and Battaglia.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

OPINIONS

In the

# United States Court of Appeals

## For the Seventh Circuit

September Term, 1967 January Session, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

vs.

SALVATORE BATTAGLIA and DAVE EVANS,
*Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Amabile were indicted for conspiring with each other and with non-

defendant Rocco Pranno to violate the Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Amabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley told Evans to line up

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[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

subcontractors but to keep it secret "from the boys in Melrose Park," specifically from defendant Amabile (also known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced

construction foreman. In September 1964, La-Key was hired by Pranno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pranno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pranno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pranno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pranno that there would be $20,000 in cash above Pranno's and DiVito's costs and profits for the job. Thereupon Pranno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pranno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pranno and care about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pranno about Amabile's demand for $20,000. Pranno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

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[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

Pranno gave DiVito and La-Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry La-Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and loan association through pay-out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid-October, Evans told La-Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La-Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La-Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, La-Key told Amabile that the draw would be for $57,000. The next day, Amabile and La-Key drove to the hospital where Evans was a patient. Amabile told La-Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La-Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pranno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La-Key accompanied Amabile to a farm in Pinegree Grove, Illinois, where Amabile introduced La-Key to Battaglia as "running the job for them" in Lansing, Illinois. La-Key heard Battaglia ask Amabile why Evans was getting "that kind of money." Amabile explained that he had made a deal with Evans who had "got us the job." Amabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La-Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Amabile that La-Key should not have been taken to the farm. When Pranno attempted to hit La-Key, Amabile stopped him, saying that he had La-Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La-Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La-Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Amabile about this in DiVito's presence and asked Amabile to locate La-Key so that the loan could be repaid. Several days later Pranno told Amabile that he was going to "the farm" to see "the man" in order to have Amabile obtain $5,000 from La-Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Amabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> "'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Amabile was short-changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, La-Key advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La-Key not to worry, saying:

> "'I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man [Battaglia or Riley[3]]. We will see that the money is in the bank for you.'"

That same month Amabile told La-Key to prepare the papers for the second draw. La-Key said that the second draw would be for $60,000. Amabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La-Key's home and changed prices to bring the draw down to $48,000. Evans told La-Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La-Key went to see Amabile. Evans was present while La-Key told Amabile what had happened. The next morning La-Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La-Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La-Key thereupon reported to Amabile that the second draw was still not authorized. Amabile told La-Key to accompany him to Riley's office the next morning. On the

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[3] In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

following day Amabile told Riley that he had to pay La-Key because "the man" [Battaglia] wanted La-Key paid. Amabile said that otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,512.48. This was the sum mentioned in the indictment and was deposited by La-Key in a Carlson account. A few days later, Amabile instructed La-Key to draw out $17,000. La-Key thereupon obtained $5,000 in cash and a certified check for $12,000. Amabile insisted upon all cash and ordered Evans to accompany La-Key to cash the check. After the $12,000 check was cashed, La-Key and Evans went to Amabile's apartment, and La-Key gave Amabile the $17,000. Amabile then gave La-Key $5,000, of which La-Key gave Evans $1,000. Amabile told La-Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La-Key to return to Chicago, at Amabile's request. Amabile then complained that La-Key had not been paying Carlson's bills, thus getting Amabile in trouble with Riley and " 'making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's.' " La-Key then told Amabile that there was no money in the Carlson account because Amabile had bled it.

A few days later, La-Key complained to Evans that the Carlson bills were unpaid because of Amabile's actions. La-Key asked Evans why he didn't get out of the business. Evans replied:

> " 'I can't get out. I am in too deep with Joe Shine [Amabile]. I know too much about the other people. * * * I can't quit. I wish I could get back to my own job where I came from.' "

Evans then said that he wished he had never met Amabile and reiterated that he was in too deep to quit.

*Sufficiency of the Evidence as to Evans*

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that violence was not contemplated. La-Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw. After the second draw, La-Key withdrew another $17,000 for Amabile, who then gave La-Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La-Key showed his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Pereira* v. *United States*, 347 U.S. 1, 12-13. As in *Lefco* v. *United States*, 74 F.2d 66, 68, 69 (3rd Cir. 1934),

[4] Previously, according to La-Key, Evans had received another "wad of bills" from Amabile.

Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a sub-conspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone* v. *United States*, 361 U.S. 212; *United States* v. *Critchley*, 353 F.2d 358 (3rd Cir. 1965), and *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone*, the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley*, the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy.[3] In *Carbo*, Gibson had legitimate business reasons for his association with the conspirators, whereas Evans' associations with Amabile were clearly for illegal purposes.

*Sufficiency of the Evidence as to Battaglia*

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's farm, Battaglia said he liked La-Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline" (*United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944)). He was commit-

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[3] *United States* v. *Sansone*, 231 F. 2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

tal to a long-term relationship contemplating the use of La-Key in numerous ventures. Battaglia admitted knowledge of Evans' paid role. He also acknowledged that he was to receive a $20,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Annabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Annabile, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators. *United States* v. *Andolschek*, *supra*. As in *United States* v. *Kahaner*, 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hickey*, 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

*Intent to Affect or Knowledge of Effect on Interstate Commerce*

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack*, 225

F.2d 665, 672 (2d Cir. 1955). As we recently held in *United States* v. *Pranno*, F.2d (7th Cir. 1967):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to effect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion would have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Anabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation. *United States* v. *Pranno*, *supra*. Furthermore, the Riley company's reserves were depleted by the extortion. Since its business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1 *supra*), that is a sufficient nexus with interstate commerce.

*Denial of Bill of Particulars*

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.[6]

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[6] The other three requests were granted and the Government answered them.

However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1962 and 1963 Palermo-Amabile threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo-Amabile threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error in this respect. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to respond as to it. No abuse of discretion has been shown with respect to the partial denial of this motion. *Wong Tai* v. *United States*, 273 U.S. 77, 82.

*Conspiracy Instruction*

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.

"You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.

"It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.

"You may consider then such evidence as pertaining to all of the defendants."

Citing *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later instruction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Pronger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States* v. *Bernard*, 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Pronger*

has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the ascribed comments and the final, proper charge. *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

*Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno*

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's statements outside the presence of the defendants. We agree with the Government that Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

*Accomplice Instruction*

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La-Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur*, 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v. *United States*, 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Rucci* v. *United States*, 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

*Restriction of Cross-examination and Refusal to Admit Defense Exhibits*

Battaglia assails the District Court's rulings restricting the cross-examination of DiVito, La-Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross-examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross-examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * *."[7] He also testified that the Assistant United States Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

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[7] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $18,500 allegedly extorted. This is impermissible. *United States* v. *Masino*, 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney*, 262 F.2d 272, 276-277 (3rd Cir. 1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States*, 344 U.S. 414, 420, note 13. As noted there, a trial judge has "wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue of the best-evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase

price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States* v. *Bender*, 218 F.2d 869, 874 (7th Cir. 1955), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross-examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.[8] No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production. Therefore, production was unnecessary. See *Dennis* v. *United States*, 384 U.S. 855, 868-875.

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[8] Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

As to Battaglia's principal cases cited to show reversible error, in *Alford* v. *United States*, 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Riley were in government custody. In *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956) and *United States* v. *Hogan*, 232 F.2d 905 (3rd Cir. 1956), the defense sought to cross-examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected lenieney in return for their testimony. The District Court refused to allow such cross-examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross-examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), where such cross-examination of government witnesses was not permitted.

*Gordon* v. *United States*, 344 U.S. 414, *United States* v. *Beckman*, 155 F.2d 580 (2d Cir. 1946), and *Meeks* v. *United States*, 163 F.2d 598 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross-examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on

motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

*Gordon*, *Masino*, and *Meeks* are further distinguishable because in those cases reversal was based on the cumulative prejudicial effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross-examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary rulings of the District Court were well within those approved in *United States* v. *Lawinski*, 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

*Evans' Character Witnesses*

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States*, 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson*. However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at

p. 481, note 17; *Williams* v. *United States*, 168 U.S. 382, 397; *Kroot* v. *United States*, 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U.S. at p. 480). (Emphasis added.)

*Restriction of Evans' Testimony*

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense.

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions. To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964.

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La-Key, DiVito and Pranno were based on the improper form of the questions and lack of proper foundation. These rulings are supportable under rudimentary rules of evidence. Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions.

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit.

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary ruling did not jeopardize his defense and were permissible interpretations of the law of evidence.

*Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify*

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile. The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 U.S. Law Week 3251), so that severance was not necessitated.

*Trial Publicity*

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v.

*United States*, 360 U.S. 310. In *Janko* v. *United States*, 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis *Post-Dispatch* article published during the trial and containing "inadmissible prejudicial information."[9] Here the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo*, 346 F.2d 253, 256 (7th Cir. 1965), certiorari denied, 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jannsen*, 339 F.2d 916, 919-920 (7th Cir. 1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has recently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell*, 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas*, 381 U.S. 532 and *Sheppard* v. *Maxwell*, 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

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[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

*Eavesdropping*

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre-trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States*, 387 U.S. 231. Accordingly, it is now academic whether the District Court should have granted a hearing to determine whether electronic eavesdropping had taken place.

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No prejudicial error having been shown, the two judgments are affirmed.

Nos. 16312 and 16313

SWYGERT, *Circuit Judge*, dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

SUFFICIENCY OF THE EVIDENCE.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Cor-

poration by using the Carlson Construction & Equipment Company as a facade so that moneys meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Riley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units by means of extortion.

In early 1964, the Riley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Riley, president of the Riley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick Palermo." A few days later Riley, at Amabile's request, met Amabile and Palermo at the latter's Melrose Park plumbing company office. Riley testified concerning this meeting:

> Nick Palermo asked me if I was going to build a project in Lansing, Illinois. I told Mr. Palermo that I was and Mr. Palermo asked me when he was going to get the blueprints so that he could figure the work. I told Mr. Palermo that I did not plan on giving him the work. I told Mr. Palermo that he was behind on his existing projects and with the efficiency that we are now enjoying, it was ridiculous to give him this project.
>
> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull, . . .
>
> • • •

Joe Shine told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.

Joe Shine told me I shouldn't be a wise guy. Joe Shine told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.

• • •

Joe Shine told me he knew where my mother lived. He would — he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1964, Amabile met Mike DiVito, a sewer contractor, and Rocco Pranno in the latter's D'Or Supper Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possible," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do

the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $300 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was unsatisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insufficient proceeds from the job to pay Amabile the twenty-thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, "Carlson Construction,

operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley Company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Amabile] asked me how much the draw was for. I told him $57,000. . . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1983, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$80,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. . . . I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evans' presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he

couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amabile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.
>
> • • •
>
> Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.
>
> I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build

up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.

* * *

He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $3,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . ." *Shannabarger* v. *United States*, 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of

materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,000 from the Riley Management Corporation by exploiting fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators. Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pramo or that Battaglia agreed with Amabile and Pramo to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job. Consistent with a scheme to defraud, DiVito and Pramo kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good, clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal — the very antithesis of fraud.

[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pramo, and LaKey.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January 1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evans' statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

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[3] This use of the phrase "the man," like some of its other uses, (*See infra* notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile

The Government also argues that the creation of Carlson Construction merely "put a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evans' cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case — that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with Evans and Battaglia to extort as the Government charged in the indictment.[4]

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would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

[4] The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too

The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1964 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500,

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deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeting testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DiVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia interceded by saying: "Cut it out, you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said, "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or

Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia. Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."
>
> From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.
>
> From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many

refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline' " and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, "*The man's* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 *for the man*." (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr. Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.* *United States* v. *Andolschek*, *supra* at 507. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere association.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone*, *supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone*, mere association is insufficient evidence of guilt to support a conviction.

## II.

### Trial Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly

prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction superintendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that his testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted coconspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a conceded criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testimony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a conceded crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was in fact an accomplice. Such modification would have cured the instruction's vice — the implied assumption that the alleged conspiracy was a proven fact. *See Gordan* v. *United States*, 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a man-

ner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation was laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or pressure of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 158, at 335 (1954).

*See also Whiting* v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial.

For as the Supreme Court said in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), "This privilege [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . ."

III

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:
Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

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Tuesday, January 9, 1968

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Before: Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter J. Cummings, *Circuit Judge*

No. 16312, 16313

United States of America, *Plaintiff-Appellee*,

v.

Salvatore Battaglia and Dave Evans,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

## APPENDIX C

### UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, April 17, 1968

BEFORE

Hon. JOHN S. HASTINGS, *Chief Judge*

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER M. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

No. 16313 vs.

DAVE EVANS, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

**IT IS ORDERED** by the Court *en banc* that the petition for a rehearing *en banc* of this cause be, and the same is hereby **DENIED.**

## APPENDIX D

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1970 SEPTEMBER SESSION, 1970

No. 17774
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
SALVATORE BATTAGLIA, *Defendant-Appellant.*
No. 17784
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
JOSEPH AMABILE, *Defendant-Appellant.*
No. 17793
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
DAVE EVANS, *Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1970

Before SWAGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

CUMMINGS, *Circuit Judge*. Defendants' convictions of violation of the Hobbs Act (18 U.S.C. § 1951) were previously affirmed by this Court, 394 F.2d 304; 395 F.2d 47. Subsequently, the Supreme Court remanded these cases to

the district court "for further proceedings in conformity with *Alderman* v. *United States*," 394 U.S. 165, so that the district court could determine, after an appropriate hearing, whether the convictions were tainted by the use of illegally obtained electronic surveillance.

Upon the remand to the district court, the Government turned over to Battaglia's counsel the overhearings involving Battaglia. The Assistant United States Attorney advised the district court that there were no overhearings of defendants Evans or Amabile.

At the hearing before the district court, a special agent of the Federal Bureau of Investigation identified three exhibits as excerpts from logs containing overheard Battaglia conversations that occurred when he visited a Chicago tailoring shop being monitored for other persons' conversations. These were examined by the district court and had previously been examined by us. 394 F.2d 327. The Government withdrew its formal offer to introduce these excerpts into evidence at the hearing after defendant Battaglia objected that proper foundation was lacking. Thereafter, on cross-examination by Battaglia's counsel, the agent explained that his duty was to check the records maintained by the Chicago office of the FBI to determine whether or not an individual had been overheard. He stated that these were the only records in his office of electronic surveillance of Battaglia. The agent also testified that his review of index cards indicating the names of the individuals overheard reinforced his conclusion that there were no other overhearings involving Battaglia. Similarly, he found no records of Airtels involving Battaglia.[1]

[1]Airtels are brief summaries of the information contained in logs of recorded conversations and are sent to FBI offices not having possession of the actual logs. See *United States* v. *Hoffa*, ..... F.2d ..... (7th Cir. 1970).

At the conclusion of the hearing, the district court found that Battaglia had failed to demonstrate that the overheard conversations "were relevant to, material to, or tainted in any way, the evidence presented at his trial," and that his conviction was not tainted by unlawful electronic surveillance. Therefore, a new judgment was entered against him, with the 15-year sentence and $10,000 fine reimposed. Likewise, the district court reimposed the same penalties upon defendants Amabile and Evans as had previously been set aside by the Supreme Court pending the outcome of the taint hearings.

I

Defendant Battaglia first attacks the correctness and adequacy of the proceedings of the taint hearing.[2] He also contends that the Government was obliged to turn over the index cards.

After the Government turned over to Battaglia's counsel the records of the overheard conversations, *Alderman v. United States*, 394 U.S. 165, 183, then required Battaglia to "go forward with specific evidence demonstrating taint." Only after Battaglia had shown a ground for finding taint would the Government face the ultimate burden of showing the evidence was untainted. 394 U.S. at p. 183. These strictures were followed by the court below. Instead of attempting to show possible sources of taint, however, defendant's counsel successfully objected to the transcripts of the conversations being received in evidence. Indeed, he has made no attempt to show that they tainted his conviction, apparently agreeing with our prior determination that they were "utterly irrelevant to these convictions." 394 F.2d at p. 328.

[2] Defendant Evans adopted generally the points raised in the briefs of his co-defendants, apparently including Battaglia's objections to the taint hearing. However, no contention has been made by either defendant Evans or Amabile as to defects in the hearing procedure.

In *Alderman*, the Court observed that a defendant does not "have an unlimited license to rummage in the files of the Department of Justice." 394 U.S. at p. 185. There has been no showing that the index cards were essential to show taint. Accordingly, we hold that the district court did not abuse its discretion in denying their production and that the hearing satisfied *Alderman*.

## II

All three defendants also seek the opportunity to present numerous additional errors relating to their convictions. Although we will not reconsider issues already decided against defendants in their previous appeals (*United States* v. *Hoffa*, ..... F.2d ..... (7th Cir. 1970), we will dispose of five assertedly new points now raised.

First, the defendants claim that the district court was required to permit them to learn the current residence of government witness Riley under *Smith* v. *Illinois*, 390 U.S. 129.[3] However, the record shows that Riley was fearful of physical harm to himself and to his family, so that the trial court properly refused to allow disclosure of Riley's last address. *United States* v. *Varelli*, 407 F.2d 735, 750 (7th Cir. 1969); see also *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969). In addition, defendants had already been permitted to establish that Riley had reason to cooperate with the Government, so that it became unnecessary to show that he was in protective custody.[4] Cf. *United States* v. *Daddano*, ..... F.2d ....., ..... (7th Cir., 1970).

[3] This point was also raised without avail in the petitions for rehearing *en banc* to review our prior opinion reported in 394 F.2d 304.

[4] Defense counsel knew that Riley was in protective custody (App. 41) and told the jury he would show this (Tr. 19 in *United States* v. *Amabile, et al.*, No. 67 CR 85 (ND Ill. 1967)). Amabile's

Battaglia further asserts that prejudicial publicity requires reversal of the convictions in light of the ruling in the related case of *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969). In that case, however, the trial judge made no inquiry of the jury as to whether any of them had read prejudicial newspaper items. Here a collective inquiry was twice made of the jury in accordance with *Margolis* v. *United States*, 407 F.2d 725, 734-735 (7th Cir. 1969), certiorari denied, 396 U.S. 833, and *United States* v. *Rizzo*, 409 F.2d 400, 402 (7th Cir. 1969), certiorari denied, 396 U.S. 911. Since none admitted contact with prejudicial publicity, it was unnecessary for the district judge to poll each juror separately. *United States* v. *Solomon*, 422 F.2d 1110, 1116-1117 (7th Cir. 1970) certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911, *United States* v. *Paddamo*, ___ F.2d ___ (7th Cir. 1970).

Battaglia argues that the indictment is duplicitous because it charges both a conspiracy and a substantive offense. In this case, the indictment was not duplicitous, for "the allegation of acts which would amount to commission of the substantive offense was merely descriptive of the conspiracy." *Reno* v. *United States*, 317 F.2d 499, 502 (5th Cir. 1963), certiorari denied, 375 U.S. 828.

Battaglia also asserts that the indictment was unconstitutional because it charged a 1964 conspiracy and was "amended and distorted" by permitting proof of a conspiracy beginning in 1962. As pointed out in our prior opinion, that evidence was "relevant to show the reason

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counsel had shown that Di Vito was in protective custody (Tr. 227-28). Battaglia's counsel may have decided not to pursue this same line of questioning with Riley (not blocked by the trial judge's refusal to permit disclosure of Riley's actual address) because it would further emphasize Riley's proclaimed fear for his life.

ableness of Riley's fear when confronted with Annabile's demand to authorize the second draw" and the jury was instructed to consider it only for that purpose. 394 F.2d at p. 313.

Finally, Battaglia and Annabile complain that they were convicted for violating the general conspiracy statute (18 U.S.C. § 371), carrying a five year maximum prison term, instead of a conspiracy in violation of the Hobbs Act (18 U.S.C. § 1951), which authorizes the imposition of their fifteen year sentences. They urge that the indictment charges a general conspiracy under 18 U.S.C. § 371 to commit the conspiracy defined under 18 U.S.C. § 1951. An examination of the indictment refutes their claim. Defendants were charged only with conspiring to extort money in violation of the Hobbs Act, which is expressly proscribed thereby.[6] Thus the grand jury charged that defendants and Rocco Pranno "did unlawfully * * * conspire * * * to obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951, and the construction of said multiple dwelling units in Lansing, Illinois, and the movement in interstate commerce of

[6] In pertinent part, the Hobbs Act (18 U.S.C. § 1951) provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished] * * * *

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (Emphasis supplied.)

materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units, and to attempt so to do by extortion, as that term is defined in Title 18, United States Code, Section 1951." The indictment then details parts of the conspiracy and concludes "[a]ll in violation of Title 18, United States Code, Section 1951."

The judgments of conviction are affirmed.

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SWYGERT, *Chief Judge*, concurring in part.

I agree that the issues presented in this appeal relating to the alleged use of illegally obtained electronic surveillance do not require reversal. However, I adhere to my dissents in the prior appeals and would reverse the convictions of the defendants for the reasons stated therein.

A true Copy:

Teste:

Howard G. Johnson
*Deputy Clerk of the United States Court of*
(Seal) *Appeals for the Seventh Circuit.*

## APPENDIX E

### OPINION OF JUDGE CUMMINGS
(Judge Swygert concurs in part)

### UNITED STATES COURT OF APPEALS
### FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

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Friday, October 2, 1970

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BEFORE

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. F. RYAN DUFFY, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

No. 17774, 17784, 17793 vs.

SALVATORE BATTAGLIA, JOSEPH AMABILE, DAVE EVANS,

*Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of conviction of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

A True Copy: */s/ Howard G. Johnson*

Teste: Deputy Clerk of the United States
(Seal) Court of Appeals for the Seventh Circuit

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 925

DAVE EVANS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 930

JOSEPH AMABILE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, together with Salvatore Battaglia, were convicted after a jury trial in the United States District Court for the Northern District of Illinois in April, 1967, of conspiring to obstruct interstate commerce by means of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Amabile was sentenced

to fifteen years' imprisonment and petitioner Evans to ten years' imprisonment. On separate appeals (Battaglia's and Evans' being heard and decided together) the convictions were affirmed by the Court of Appeals for the Seventh Circuit with one judge dissenting (Ev. App. 1-45, 394 F. 2d 304; Am. App. 1-21, 395 F. 2d 47).[1] Motions by Evans and Battaglia for a remand were denied (394 F. 2d 327), as were their petitions for a rehearing *en banc* (Ev. App. 47). On separate petitions for writs of certiorari (*Evans:* No. 106, O.T. 1968; *Amabile:* No. 129, O.T. 1968; *Battaglia:* No. 168, O.T. 1968) to which the government filed a single response, this Court remanded the cases, along with a number of others (*sub nom. Giordano* v. *United States*, 394 U.S. 310), for further district court proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165; these proceedings related to three electronically overheard conversations involving Battaglia previously disclosed by the government to the court of appeals, which, after *in camera* examination, had held irrelevant. After a full evidentiary hearing on the remand, the district court found that the overhearings (which did not involve petitioners) did not taint the convictions, and reimposed the original judgments and sentences. The court of appeals affirmed, with one judge concurring on the question of eavesdropping but adher-

[1] "Ev. Pet." refers to the petition in No. 925 and "Ev. App." to the appendix to that petition; "Am. Pet." refers to the petition in No. 930 and "Am. App." to the appendix to that petition.

ing to his original dissents in the prior appeals (Ev. App 48-54; Am. App. 67-73).

Petitioners do not suggest any error in respect to the disposition of the eavesdropping question.[2] Instead, they have each resubmitted substantially the same petitions which they had previously filed and which were answered in detail in our prior brief in opposition.[3] Their claims in essence are that the evidence was insufficient to establish a conspiracy to commit extortion in violation of the Hobbs Act (answered at pp. 11-14 of our brief); that the Hobbs Act did not reach the circumstances developed in this case (answered at pp. 20-22 of our brief); that improper limitations were placed on defense cross-examination of the victim of the extortion (answered at pp. 17-19 of our brief); that the grand jury testimony of government witnesses should have been fully disclosed to the defense (answered at pp. 14-17 of our brief);

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[2] Battaglia, the only defendant involved in the overhearings, received an extension of time until December 1, 1970, to file a petition for a writ of certiorari and his petition (No. 1032) was filed on that date; we will file a separate response.

[3] Amabile argues for the first time in his instant petition that the trial court committed prejudicial error by foreclosing cross-examination on the then current address of the victim of the conspiracy, who was the principal government witness (Am. Pet. 45-47). The same contention, however, was made by Evans and Battaglia in their prior petitions and answered in our prior brief. Both petitioners also now suggest that ascertaining the exact address was less important than establishing the witness' "relationship with the Government"—*i.e.*, that he was in protective custody (Am. Pet. 47; Ev. Pet. 23). As the court below pointed out, however, refusal to permit disclosure of the witness' actual address did not block other inquiries which could have developed such relationship (Ev. App. 52 n. 4; Am. App. 71 n. 4).

that improper limitations were placed on inquiries concerning Jencks Act material (answered at pp. 23-27 of our brief); and that the trial court erroneously precluded the defense from introducing reputation evidence (answered at pp. 22-23 of our brief).

We are filing herewith ten additional copies of our brief in opposition filed in the 1968 Term for distribution to the Court. For the reasons stated in that brief, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
*Attorneys.*

DECEMBER 1970.

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